

CHALLENGES AND PROSPECTS
FOR THE WTO

Andrew D Mitchell

Copyright © Cameron May

Published 2005 by Cameron May Ltd
17 Queen Anne's Gate, London SW1H 9BU, UK.
Tel: +44 (0)20 7799 3636 Fax: +44 (0)20 7222 8517
email: enquiries@cameronmay.com
Website: <http://www.lexmercatoria.org>

All rights reserved. Except for the quotation of short passages for the purpose of criticism and review, no part of this publication may be reproduced, stored in a retrieval system or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior permission of the publisher.

This book is sold subject to the condition that it shall not by way of trade or otherwise, be lent, re-sold, hired out, or otherwise circulated without the publisher's prior consent in any form of binding or cover other than that which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

ISBN: 1 905017 04 9

Printed and Bound in Great Britain by CLE PRINT

CONTENTS

Abbreviations	vii
Introduction	1
ANDREW D MITCHELL	
<i>Part I</i> The State of Play	
1 From Doha to Cancún — Crossroads or Cul-de-Sac?	9
NEIL McMILLAN	
2 WTO Dispute Settlement: An Overview	23
VALERIE HUGHES	
<i>Part II</i> Defining the Boundaries of the WTO	
3 Has the WTO Gone Too Far or Not Far Enough? Some Reflections on the Concept of 'Policy Space'	55
OLIVIER CATTANEO	
4 The WTO's 'Objective Assessment' Standard of Review and Panel Review of Health Measures	85
CATHERINE BUTTON	
<i>Part III</i> The Scope of WTO Dispute Settlement	
5 What is the Measure at Issue?	115
ALAN YANOVICH AND TANIA VOON	
6 The <i>Sardines</i> Decision: Fish Without Chips?	165
ARTHUR E APPLETON AND VEIJO HEISKANEN	
7 The Question of Remand Authority for the Appellate Body	193
FERNANDO PIÉROLA	
<i>Part IV</i> The Interface Between RTAs and the WTO	
8 Regional Trade Agreements under GATT 1994: An Exception and Its Limits	217
NICOLAS JS LOCKHART AND ANDREW D MITCHELL	

9	The Australia-United States FTA as a 'Third Wave' Trade Agreement: Beyond the WTO Envelope ANDREW L STOLER	253
10	Review of Trade Remedy Measures in the EU and the WTO — Two Alternative Options? DAN HOROVITZ	269
	Biographies	299

THE QUESTION OF REMAND AUTHORITY FOR THE APPELLATE BODY*

FERNANDO PIÉROLA[†]

In this chapter, the author addresses the possibility of introducing remand authority for the Appellate Body of the World Trade Organization. In the absence of such authority, uncertainty and unpredictability can arise in particular cases due to the current limits on the scope of appellate review. The willingness of the Appellate Body to complete the panel's analysis in some circumstances does not fully resolve this problem, especially where the panel's factual findings are inadequate. Moreover, the legal basis of this Appellate Body technique may be questioned. The introduction of remand authority would improve due process and fairness in WTO dispute settlement, and the practical implications in terms of additional time and workload needed for dispute settlement proceedings would not be overwhelming. On balance, remand authority is an attractive solution to the existing problems and should be preferred to the alternatives for reform in this area.

* *A Moza, por todo el amor que nos diste en casa.*

[†] Counsel, Advisory Centre on WTO Law. The views expressed in this chapter are my own. I would like to give special thanks to Andrew D Mitchell for his valuable comments and to William Davey for his comments on a prior draft of this chapter.

I	INTRODUCTION	195
II	PROBLEMS ARISING FROM THE CURRENT SYSTEM	196
A	<i>Powers of the Appellate Body</i>	196
B	<i>Panels' Use of Judicial Economy</i>	197
C	<i>Circumstances in which Remand Authority Could be Used</i>	199
D	<i>Existing Alternatives for the Appellate Body in the Absence of Remand Authority</i>	200
1	Completing the Analysis	201
(a)	<i>The Practice and its Features</i>	201
(i)	Duty or Discretion?	201
(ii)	The Need for a Factual Basis and a Logical Continuum	202
(b)	<i>Assessing the Practice</i>	204
(i)	Factual Basis	204
(ii)	Legal Basis and Uncertainty	204
(iii)	Absence of Appellate Review	207
2	Leaving Issues Undecided	207
III	EVALUATING THE POSSIBILITY OF REMAND AUTHORITY FOR THE APPELLATE BODY	208
A	<i>Due Process and Fairness</i>	208
B	<i>Scope of Appellate Review</i>	210
C	<i>Delays in Dispute Settlement</i>	210
1	Implications for the Parties	210
2	Attenuation of Delays with other DSU Reforms	211
D	<i>Resource Implications for the WTO Adjudicating Bodies</i>	213
E	<i>Possible Alternatives to Remand Authority</i>	214
IV	CONCLUSION	215

I INTRODUCTION

Under GATT 1947, panels' recommendations that losing parties bring their illegal measures into conformity were adopted by the so-called 'positive consensus rule'. According to this rule, any GATT contracting party, including the losing party to a dispute, could block the adoption of a Panel Report.¹ On the one hand, this practice was seen as a legitimate means to involve GATT contracting parties in the resolution of trade disputes, given the failure to establish GATT as an intergovernmental organisation and the consequent lack of treaty-based jurisdiction by panels to examine trade disputes. On the other hand, this practice sometimes prevented satisfactory resolution of trade disputes when the matters at issue were politically contentious. In order to overcome this situation, WTO Members agreed to change the rule from positive consensus to negative consensus. In other words, under the DSU, Members should adopt Panel Reports automatically unless there is a consensus to the contrary.²

The creation of a standing Appellate Body for the judicial settlement of trade disputes is one of the major innovations of the WTO dispute settlement system.³ The concept of an Appellate Body can be seen as a counterpart to the introduction of the negative consensus rule, to prevent the possibility of panels' legal errors being adopted 'untouched'.⁴ However, the Appellate Body's powers are limited. In particular, the scope of appellate review is restricted, and the Appellate Body lacks remand authority – that is, the authority to return a matter to the original panel to be decided in accordance with the Appellate Body's ruling. In some

¹ Julio Lacarte and Fernando Piérola, 'Comparing the WTO and GATT Dispute Settlement Mechanisms: What was Accomplished in the Uruguay Round?' in Julio Lacarte and Jaime Granados (ed), *Inter-Governmental Trade Dispute Settlement: Multilateral and Regional Approaches* (2004) 33, 51.

² DSU, art 16.4. The negative consensus rule also applies to the adoption of Appellate Body reports, the establishment of panels, and the authorisation to suspend concessions and other obligations.

³ Ernst-Ulrich Petersmann, 'How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System' (1998) 1 *Journal of International Economic Law* 25, 38; see also Robert Howse and Michael Trebilcock, *The Regulation International Trade* (2nd ed, 1999) 78; David Palmeter and Petros Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (1999) 147.

⁴ Robert Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8 *Minnesota Journal of Global Trade* 1, 27; John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd ed, 1999) 125; John H Jackson, William Davey and Alan Sykes, *Legal Problems of International Economic Relations, Cases Materials and Text on the National and International Regulation of Transnational Economic Relations* (3rd ed, 1995) 343; Giorgio Sacerdoti, 'Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review' in Ernst-Ulrich Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System, Studies in Transnational Economic Law*, vol 11 (1997) 245, 247.

circumstances, given the negative consensus rule, this means that Panel Reports may be adopted as modified by an Appellate Body Report, leaving certain matters unresolved. This may raise doubts as to whether the relevant recommendations or rulings have 'achiev[ed] a satisfactory settlement of the matter'⁵ and contributed to 'security and predictability [in] the multilateral trading system'⁶ in accordance with the DSU.

In the current negotiations on the DSU, some Members have raised the possibility of providing the Appellate Body with remand authority.⁷ This chapter evaluates this possibility, based on the experience of the WTO dispute settlement system since 1995. In the following section, I examine the limits on the powers of the Appellate Body under the DSU, the particular circumstances in which the absence of remand authority becomes relevant and problematic, and the existing alternatives of the Appellate Body when such circumstances arise. Next, I consider the advantages and disadvantages of instituting remand authority in light of the alternatives. Finally, the chapter draws a conclusion on the feasibility of introducing remand authority and its likely impact in WTO disputes.

II PROBLEMS ARISING FROM THE CURRENT SYSTEM

A *Powers of the Appellate Body*

The DSU confers the Appellate Body two significant types of powers: those relating to the scope of appellate review, and those relating to the actions that the Appellate Body may take.

Article 17.1 of the DSU provides for the establishment of the Appellate Body to 'hear appeals from panel cases'. This provision implies that the Appellate Body cannot decline jurisdiction over challenges to panel decisions by way of appeals. Furthermore, it implies that the Appellate Body's main function is to review issues already dealt with at the panel stage, but it does not expressly exclude *de novo* reviews under specified circumstances.

The scope of the Appellate Body's activity is limited under Article 17.6 'to issues of law covered in the panel report and legal interpretations developed by the panel'. This provision excludes the Appellate Body's examination of facts except in two specific circumstances: (i) examination of the facts of the case in order to examine whether the panel made an objective assessment of

⁵ DSU, art 3.4.

⁶ DSU, art 3.2.

⁷ Communication from Jordan, *Jordan's Further Contribution Towards the Improvement and Clarification of the Dispute Settlement Understanding*, TN/DS/W/56 (19 May 2003); Communication from the European Communities, *Contribution of the European Communities and Its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding*, TN/DS/W/38 (23 January 2003).

them; and (ii) examination of the facts of the proceedings in order to determine whether the panel's procedural conduct was in accordance with due process requirements. Even though they are based on facts, the Appellate Body has characterised these two kinds of matters as issues of law.

Article 17.13 provides that '[t]he Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel'. Thus, after examining the issues of law raised on appeal, the Appellate Body may agree with the panel and uphold the panel's findings, interpretations and conclusions. Alternatively, it may disagree with the panel. At this stage, the Appellate Body has to decide how to proceed: it either modifies the panel's findings by stating its own legal reasoning or reverses the panel's findings and replaces them with its own, or it just modifies or reverses the panel's findings without providing subsequent reasoning or findings. Under the DSU, where the Appellate Body modifies or reverses panel findings, it is not expressly entitled to remand the matter to the panel to be decided anew.⁸

Furthermore, Article 19.2. points out that 'in their findings and recommendations, the panel and Appellate Body cannot add or diminish the rights and obligations in the covered agreements'. This provision imposes a horizontal control on the Appellate Body's findings and conclusions – they must be limited to the matters discussed in the course of the dispute and the parties involved therein.

B Panels' Use of Judicial Economy

In many instances, panels leave certain factual or legal issues resolved as a result of the principle of 'judicial economy'.⁹ By virtue of this principle, '[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute'.¹⁰ The discretion of panels to limit their findings to the minimum required to resolve the dispute, applying the principle of judicial economy, is widely accepted in most legal systems.¹¹ Acknowledging the value of judicial economy in the GATT/WTO context, the Appellate Body has stated:

⁸ Nonetheless, a prestigious expert has submitted that the Appellate Body has implied remand powers as 'the negative aspects of the current solution outweigh the interpretation of the DSU: that the Appellate Body has the prerogative to send the case back to the DSB so that the proceeding can be completed by a panel in compliance with the system set up by the DSU': Jacques Bourgeois, 'Some Reflections on the WTO Dispute Settlement System from a Practitioner's Perspective' (2001) 4 *Journal of International Economic Law* 145, 152.

⁹ William Davey, 'Has the WTO Dispute Settlement System Exceeded its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue-Avoidance Techniques' (2001) 4 *Journal of International Economic Law* 79, 108.

¹⁰ Appellate Body Report, *US – Wool Shirts and Blouses*, 19.

¹¹ Jeffrey Waincymer, *WTO Litigation, Procedural Aspects of Formal Dispute Settlement* (2002) 371.

Nothing ... in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party. Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues. Thus, if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated. In recent WTO practice, panels likewise have refrained from examining each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter.¹²

Judicial economy appears to be a valid way of dealing with controversial points that need not be addressed in order to settle a dispute.¹³ In addition, Palmeto and Mavroidis point to the fact that judicial economy is useful to save judicial resources and a 'less expansive approach which seems appropriate to bodies reviewing the programmes and actions of sovereign governments'.¹⁴ Even though judicial economy is frequently exercised in respect of claims raised by complainants, we consider that this principle may also be applied to respondents' defences.

The use of judicial economy by panels has been upheld by the Appellate Body in several disputes, such as *US – Wool Shirts and Blouses*,¹⁵ *Canada – Autos*,¹⁶ *India – Patents (US)*,¹⁷ *Australia – Salmon*,¹⁸ *US – Wheat Gluten*,¹⁹ and *US – Lead and Bismuth II*.²⁰ The Appellate Body has also used judicial economy in its own proceedings.²¹

Judicial economy appears to be a useful instrument for the settlement of disputes at the panel stage. It saves judicial costs for the panel and the WTO Secretariat, minimises the political impact of rulings for the parties and other WTO Members, and reduces the length of the litigation process.

¹² Appellate Body Report, *US – Wool Shirts and Blouses*, 18.

¹³ Waincymer, above n 11, 368.

¹⁴ Palmeto and Mavroidis, above n 3, 149.

¹⁵ Appellate Body Report, *US – Wool Shirts and Blouses*, 19.

¹⁶ Appellate Body Report, *Canada – Autos*, para 110.

¹⁷ Appellate Body Report, *India – Patents (US)*, para 87.

¹⁸ Appellate Body Report, *Australia – Salmon*, para 223.

¹⁹ Appellate Body Report, *US – Wheat Gluten*, paras 177–186.

²⁰ Appellate Body Report, *US – Lead and Bismuth II*, para 71.

²¹ See, eg, Appellate Body Report, *Argentina – Footwear (EC)*, para 98.

Nonetheless, it also imposes certain shortcomings when the Appellate Body reverses panel findings.

C Circumstances in which Remand Authority Could be Used

Given the limitation on the Appellate Body's power to examine issues of fact and the absence of remand authority, the Appellate Body may in certain circumstances find itself in a problematic situation when it modifies or reverses findings, interpretations or conclusions of the panel.

In some instances, modification or reversal of a panel's legal findings, interpretations or conclusions may not be an obstacle to the resolution of a dispute. This may happen, for example, where the Appellate Body modifies or reverses a legal finding that is the ultimate step in the panel's legal analysis under a specified provision, and the facts underlying that legal issue are either undisputed or sufficiently established by the panel.

For instance, in *EC – Bed Linen*, the panel interpreted Article 2.2.2(ii) of the Anti-Dumping Agreement as allowing a Member investigating dumping to construct an exporter's administrative, selling and general costs (SG&A) based on the actual SG&A of one other exporter subject to investigation, even though the provision refers to the *weighted average* from other *exporters* or *producers* subject to investigation. Accordingly, the panel found that the European Communities' methodology was WTO-consistent.²² The Appellate Body disagreed with the panel's interpretation of Article 2.2.2(ii). From the wording 'weighted average', 'exporters' and 'producers' in that provision, the Appellate Body reasoned that the basis for the methodology in question could not be information from a single exporter. The Appellate Body therefore reversed the panel's interpretation. As the European Communities did not dispute the fact that it had taken into account information from only a single exporter (although this factor is not expressly mentioned in the Appellate Body Report), the Appellate Body concluded that the European Communities had violated Article 2.2.2(ii) of the Anti-Dumping Agreement.²³ As this issue arose only at the final step of the legal analysis, the absence of remand authority did not prevent this issue from being resolved.

However, in other cases, reversals or modifications pose difficulties for the ultimate resolution of disputes. A reversal or modification of certain legal findings or conclusions may entail:

- (a) the resurgence of issues within the legal analysis under a specified provision; or

²² Panel Report, *EC – Bed Linen*, para 6.75.

²³ Appellate Body Report, *EC – Bed Linen*, para 85.

- (b) the revival of subsidiary claims or defences before the panel.

Two frequently cited cases²⁴ illustrate these situations. With respect to the situation described in (a), the Appellate Body in *US – Gasoline* reversed the panel's finding that the measure at issue prescribing quality standards for gasoline was not a measure 'relating to' an exhaustible resource within the meaning of Article XX(g) of GATT 1994.²⁵ Given this finding, the panel did not proceed with the following issues: (i) whether the measure was 'made effective in conjunction with restrictions on domestic production or consumption' under Article XX(g); and (ii) whether the measure was consistent with the requirements of the chapeau of Article XX. After the Appellate Body's reversal, these issues became relevant without the benefit of the panel's analysis.²⁶ With respect to the situation described in (b) above, in *Canada – Periodicals*, the Appellate Body reversed the panel's finding that the measure at issue was inconsistent with the first sentence of Article III:2 of GATT 1994.²⁷ In addition to this claim, Canada had raised a claim under GATT Article III:2, second sentence. However, the panel expressly declined to decide this claim as it had already found that the measure at issue was inconsistent with the first sentence.²⁸

Thus, Appellate Body reversal or modification of panel findings may pose problems where:

- whether by virtue of the principle of judicial economy' or otherwise, the panel did not address the relevant legal issue, claim or defence; or
- the panel has not even made factual findings on the relevant issues, claims or defences.

D Existing Alternatives for the Appellate Body in the Absence of Remand Authority

In domestic courts, after reversing the findings of a lower court, a higher court would typically:

- (a) examine the issues that were not addressed by the lower court and 'complete' the analysis on these matters;
- (b) remand the case to the lower court in order to let it correct any errors and complete the analysis; or

²⁴ See, Palmetier and Mavroidis, above n 3, 148 and Terence Stewart and Amy Ann Karpel, 'Review of the Dispute Settlement Understanding: Operation of Panels' (2000) 31 *Law and Policy in International Business* 642.

²⁵ Appellate Body Report, *US – Gasoline*, 19.

²⁶ *Ibid.*

²⁷ Appellate Body Report, *Canada – Periodicals*, 23.

²⁸ Panel Report, *Canada – Periodicals*, para 5.30.

- (c) leave the issues undecided (although this alternative is negated under most domestic legal systems as it has the effects equivalent to *non liquet*).

Given the absence of remand authority under the DSU, the only options available to the Appellate Body in these circumstances are (a) or (c). I now consider these options in turn.

1 Completing the Analysis

(a) *The Practice and its Features*

(i) Duty or Discretion?

The Appellate Body has repeatedly completed the analysis of panels since its first appellate review.²⁹ This is demonstrated in the two appeals just mentioned as raising issues that the panel had not addressed. In *US – Gasoline*, after reversing the panel's findings and conclusions on whether the measure at issue was a measure 'relating to' an exhaustible resource within the meaning of Article XX(g) of GATT 1994, the Appellate Body completed the legal analysis in order to examine whether the measure at issue was 'necessary' under Article XX(g) and whether the measure was consistent with the requirements of the chapeau of GATT Article XX. The Appellate Body found that the panel had erred in law in failing to decide the other aspects of the Article XX analysis.³⁰ Completion of the analysis in this case was within the examination of the same provision at issue, namely Article XX.

In *Canada – Periodicals*, the Appellate Body completed the analysis again but under different circumstances. After reversing the panel's finding under Article III:2, first sentence, the Appellate Body considered it necessary to analyse the complainant's claim under Article III:2, second sentence. Unlike in *US – Gasoline*, the Appellate Body stated that it had a duty to do so:

As the legal obligations in the first and second sentences are two closely-linked steps in determining the consistency of an internal tax measure with the national treatment obligations of Article III:2, the Appellate Body would be remiss in not completing the analysis of Article III:2. In the case at hand, the Panel made legal findings and conclusions concerning the first sentence of Article III:2, and because we

²⁹ See the cases cited in Appellate Body Report, *EC – Asbestos*, para 78.

³⁰ Appellate Body Report, *US – Wool Shirts and Blouses*, 20.

reverse one of those findings, we need to develop our analysis based on the Panel Report in order to issue legal conclusions with respect to Article III:2, second sentence, of the GATT 1994.³¹

Similarly, in *US – Shrimp*,³² the Appellate Body again faced the need to complete the analysis and stated that this is, in some circumstances, its responsibility:

[W]e believe that it is our duty and our responsibility to complete the legal analysis in this case in order to determine whether Section 609 qualifies for justification under Article XX. In doing this, we are fully aware of our jurisdiction and mandate under Article 17 of the DSU. ... We do this, in part, recognizing that Article 3.7 of the DSU emphasizes that: 'The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.'³³

In carrying out this practice under a sense of 'duty', which the DSU does not explicitly impose, it may be argued that the Appellate Body has developed a customary rule for its own proceedings.

(ii) The Need for a Factual Basis and a Logical Continuum

As previously suggested, the Appellate Body can complete the panel's analysis only where the facts allow it. In *US – Shrimp*, after asserting its duty to complete the analysis, the Appellate Body stated:

Fortunately, in the present case, as in the mentioned previous cases, we believe that the facts on the record of the panel proceedings permit us to undertake the completion of the analysis required to resolve this dispute.³⁴

In *Australia – Salmon*, the Appellate Body again indicated that the need for facts to complete the analysis:

[W]e believe that — to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record — we should complete the legal analysis and determine whether the

³¹ Appellate Body Report, *Canada – Periodicals*, 23.

³² Appellate Body Report, *US – Shrimp*, para 123.

³³ *Ibid* paras 123–124.

³⁴ *Ibid*.

actual SPS measure at issue, ie, Australia's *import prohibition* on fresh, chilled or frozen ocean-caught Pacific salmon, is based on a risk assessment.³⁵

Conversely, the Appellate Body has refused to complete the analysis on many occasions in which completion of the analysis was impossible because of deficiencies in the factual findings or the panel record.³⁶ For instance, in *EC – Hormones*, after reversing the panel's conclusion under Article 5.5 of the SPS Agreement, the Appellate Body considered that 'it [could not] be assumed that all the findings of fact necessary to proceed to a determination of consistency or inconsistency of the EC measures with the requirements of Article 5.6 [had] been made by the Panel...'.³⁷ The same occurred in *Korea – Dairy*, where the Appellate Body found that:

In the absence of any factual findings by the Panel or undisputed facts in the Panel record relating to whether the alleged increase in imports was, indeed, 'a result of unforeseen developments' and of the effect of the obligations incurred by a Member under this agreement, ... we are not in a position, within the scope of our mandate set forth in Article 17 of the DSU, to complete the analysis and make a determination as to whether Korea acted inconsistently with its obligations under Article XIX:1(a). Accordingly, we are unable to come to a conclusion on whether or not Korea violated its obligation under Article XIX:1(a) of the GATT 1994.³⁸

The criterion of complete factual record or factual findings by the panel appears to be supplemented by a more substantive element when the completion of the analysis concerns provisions other than those examined by the panel. The Appellate Body has stated on certain occasions that, in order to complete the analysis, there must be a 'logical continuum' between the provisions at issue:

The need for sufficient facts is not the only limit on our ability to complete the legal analysis in any given case. In *Canada – Periodicals*, we reversed the panel's conclusion that the measure at issue was inconsistent with Article III:2, first sentence, of the GATT 1994, and we then proceeded to examine the United States' claims under Article III:2, second sentence, which the

³⁵ Appellate Body Report, *Australia – Salmon*, para 118.

³⁶ See the cases cited in *ibid* para 79.

³⁷ Appellate Body Report, *EC – Hormones*, 229–230.

³⁸ Appellate Body Report, *Korea – Dairy*, para 92.

panel had not examined at all. However, in embarking there on an analysis of a provision that the panel had not considered, we emphasized that ‘the first and second sentences of Article III:2 are *closely related*’ and that those two sentences are ‘part of a *logical continuum*’.³⁹

(b) *Assessing the Practice*

(i) Factual Basis

Even though the Appellate Body has indicated that it will complete the analysis only when presented with sufficient factual findings by the panel or undisputed facts in the panel record, it is important to note that the facts on the panel record do not necessarily constitute factual findings of the panel.⁴⁰ In addition, not all undisputed facts contained in the record are truly ‘undisputed’ in the sense that the parties would agree on them. Rather, the parties might not have disputed the facts purely because they did not consider them or did not regard them as relevant in resolving the dispute.

Another concern arising from the Appellate Body’s rulings in this area is that in some controversial cases it has completed the analysis in circumstances that required it to resolve issues of fact. As noted by Appleton,⁴¹ in *US – Shrimp* for example, although the Appellate Body stated that ‘the record of the panel proceedings permit[s] us to undertake the completion of the analysis required to resolve this dispute’,⁴² it made some factual findings with regard to the actual application of the measure at issue.⁴³ Furthermore, in *US – Wheat Gluten*, the Appellate Body also engaged in a factual analysis in relation to whether the US authorities had considered the protein content of wheat as a relevant factor for the assessment of domestic consumption, and also the price of wheat gluten for the determination of injury.⁴⁴

(ii) Legal Basis and Uncertainty

The basic argument in favour of completing the analysis is that it enables the Appellate Body to provide a positive response to complaints when panels exercise judicial economy or otherwise leave issues unanswered.

³⁹ Appellate Body Report, *EC – Asbestos*, para 79 (emphasis added, footnotes omitted).

⁴⁰ Arthur E Appleton, ‘*Shrimp/Turtle: Untangling the Nets*’ (1999) 2 *Journal of International Economic Law* 477, 479.

⁴¹ *Ibid.*

⁴² Appellate Body Report, *US – Shrimp*, paras 123–124.

⁴³ *Ibid.* paras 163–164, 179.

⁴⁴ Appellate Body Report, *US – Wheat Gluten*, para 59.

However, the legal basis for the Appellate Body to complete the analysis is unclear. Even though several provisions of the DSU may implicitly accommodate this practice,⁴⁵ Articles 17.6 and 17.13 do not expressly authorise the Appellate Body to complete a panel's legal analysis.

In *Canada – Periodicals*, Canada argued that the Appellate Body lacked jurisdiction to examine a claim under Article III:2, second sentence, of GATT 1994, given that no party had appealed panel findings relating to that provision. Canada also referred to the requirement in Article 17.6 of the DSU that an appeal be limited to issues of law covered in the Panel Report and legal interpretations developed by the panel.⁴⁶ The Appellate Body responded:

We believe the Appellate Body can, and should, complete the analysis of Article III:2 of the GATT 1994 in this case by examining the measure with reference to its consistency with the second sentence of Article III:2, provided that there is a sufficient basis in the Panel Report to allow us to do so ...⁴⁷

The Appellate Body provided no explanation as to the legal basis for completing the analysis in the light of Article 17.6 of the DSU.

In *Australia – Salmon*, before completing the analysis of a claim that the panel had not addressed, stated:

We are cognizant of the provisions of Article 17 of the DSU that state our jurisdiction and our mandate. Article 17.6 of the DSU provides: 'An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.' Article 17.13 of the DSU states: 'The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.' In certain appeals, when we reverse a panel's finding on a legal issue, we may examine and decide an issue that was not specifically addressed by the panel, in order to complete the legal analysis and resolve the dispute between the parties ...⁴⁸

It is important to note that, in addressing claims not addressed by the panel, the Appellate Body has implicitly enlarged its powers to look not

⁴⁵ For example, Article 3.3 of the DSU emphasises the importance of 'prompt settlement' of disputes, which would be hindered if issues were left undecided.

⁴⁶ Appellate Body Report, *Canada – Periodicals*, 23.

⁴⁷ *Ibid* 24.

⁴⁸ *Ibid* para 117.

only into issues not covered by the Panel Report, but also to make findings beyond those of the panel. A strict reading of Articles 17.6, 17.12 and 17.13 of the DSU to prevent this kind of review by the Appellate Body could lead to unsatisfactory results for complainants. This was the case in *EC – Poultry*, where the Appellate Body held:

[The panel conclusion] leaves unanswered two issues that were raised by Brazil before the Panel ... With respect to these two issues, we are mindful of our mandate under Article 17.6 ... and ... Article 17.13 of the DSU... With these constraints in mind, we note that there is no finding nor any 'legal interpretation developed by the panel' that may be the subject of an appeal of which the Appellate Body may take cognizance.⁴⁹

Thus, the Appellate Body took the approach of not addressing the issues raised by Brazil that were contained in the Panel Report. However, in respect of a different claim, it ruled the contrary:

We are aware of the provisions of Article 17 of the DSU that state our jurisdiction and our mandate. ... In certain appeals, however, the reversal of a panel's finding on a legal issue may require us to make a finding on a legal issue which was not addressed by the panel ... And, in this appeal, as we have reversed the Panel's finding on Article 5.1(b), we believe we should complete our analysis of the c.i.f. import price by making a finding with respect to the consistency of the EC regulation with Article 5.5, which was not addressed by the Panel for reasons of judicial economy.⁵⁰

Lichtenbaum queries how to reconcile these two conclusions in the same document: 'if the lack of a panel finding precludes Appellate Body jurisdiction, this rule should also apply in the situation where the lack of a panel finding was due to the application of the judicial economy approach.'⁵¹ As a result, the circumstances in which the Appellate Body may or will complete the panel's analysis are uncertain. It may be argued that this procedural uncertainty diminishes the parties' rights to defend their interests in accordance with due process in the WTO dispute settlement system, as discussed further below.

⁴⁹ Appellate Body Report, *EC – Poultry*, para 107.

⁵⁰ *Ibid* para 156

⁵¹ Peter Lichtenbaum, 'Procedural Issues in WTO Dispute Resolution' (1998) 19 *Michigan Journal of International Law* 1195, 1270.

A strict reading of the competences of the Appellate Body may lead to even greater difficulties for respondents than complainants. If for any reason the Appellate Body cannot complete the analysis of a defence that may justify the WTO-inconsistency of the respondent's measure, the respondent would find itself in the curious situation in which it would have to implement recommendations and rulings regarding a measure for which it considers it has a defence. The absence of a ruling on such a defence would be due to a mixture of judicial economy and the distribution of powers between panels and the Appellate Body — matters that are completely unrelated to the validity of the defence.

(iii) Absence of Appellate Review

Another problem with the Appellate Body completing the panel's analysis relates to the lack of further review of the analysis that is completed. Palmetier considers that the Appellate Body's analysis in these circumstances is the equivalent of *de novo* review, and that the resulting decisions are 'unreviewed' and 'unreviewable' due to the absence of appeal.⁵² According to this author, '[d]e novo decisions of the Appellate Body lack the primary benefit of appellate review, which is a second, more focused examination of a contentious issue, by individuals other than those who made the initial decision.'⁵³

That decisions do not benefit from a potential review is not a sufficient argument to dismiss the power of the Appellate Body to complete the analysis. The functions and tasks of panels and the Appellate Body are different and, given that the Appellate Body has the power to modify a panel's reasoning, it may always come up with new considerations.⁵⁴ Even in judicial systems where there is remand authority, it is more efficient in some instances for the higher court to modify the issues undecided (and 'complete the legal analysis') rather than to send the case back to the lower court to be corrected.

2 Leaving Issues Undecided

This is the only feasible alternative for the Appellate Body when modification or reversal of a panel finding raises issues for which there

⁵² David Palmetier, 'The WTO Appellate Body Needs Remand Authority' (1998) 32 *Journal of World Trade* 41, 43.

⁵³ *Ibid.*

⁵⁴ The Appellate Body noted this distinction in *US – Wheat Gluten*, where it said: in view of the distinction between the respective roles of the Appellate Body and panels, we have taken care to emphasize that a panel's appreciation of the evidence falls, in principle, 'within the scope of the panel's discretion as the trier of facts'. Appellate Body Report, *US – Wheat Gluten*, para 151 (footnote omitted).

are no factual findings or factual basis in the panel record. In *Canada – Periodicals*, given the absence of necessary factual elements, the Appellate Body could not proceed to determine whether the investigated products were like products. In *EC – Computer Equipment*,⁵⁵ the Appellate Body reversed the panel's legal conclusion that 'legitimate expectations' of an exporting Member are relevant for interpreting the terms of a tariff Schedule and therefore for assessing the violation of GATT Article II:1.⁵⁶ The Appellate Body did not look further into the panel record to determine whether it could uphold the panel's final conclusion for different reasons. The Appellate Body left the substantive issue undecided, with an unsatisfactory result for the complainant.

This alternative seems to lead to a denial of justice for parties to a dispute, meaning that complainants would 'need to bring the entire dispute back to the panel level to have this issue settled, starting again at the beginning of the dispute settlement process',⁵⁷ and that respondents might face a recommendation to bring their measure into conformity even though a defence may have been validly raised. These results do not seem consistent with the objective of achieving positive and meaningful solutions to trade disputes.

III EVALUATING THE POSSIBILITY OF REMAND AUTHORITY FOR THE APPELLATE BODY

Arguments in favour of remand authority for the Appellate Body typically focus on considerations of two kinds: (a) due process and fairness; and (b) the proper limits to appellate review. Arguments against remand authority are typically focus on: (a) delays in the settlement of disputes; and (b) the institutional implications for the WTO – in particular, resource implications. I consider these various arguments below.

A *Due Process and Fairness*

The Appellate Body has repeatedly invoked due process as a principle informing the DSU.⁵⁸ In *India – Patents (US)*, the Appellate Body pointed out that claims and facts should be raised by the parties from the very beginning, as a matter of *due process*, implicit in the DSU.⁵⁹ Likewise, in that report the Appellate Body related due process to the timely provision

⁵⁵ Appellate Body Report, *EC – Computer Equipment*.

⁵⁶ *Ibid* para 97.

⁵⁷ Andrew Shoyer and Eric Solovy, 'The Process and Procedure of Litigating at the World Trade Organization: A Review of the work of the Appellate Body' (2000) 31 *Law and Policy in International Business* 677, 690.

⁵⁸ See eg Appellate Body Report, *Mexico – Corn Syrup* (Article 21.5 – US), para 107.

⁵⁹ Appellate Body Report, *India – Patents (US)*, para 38.

of accurate information and the need for parties to have an opportunity to defend themselves. The Appellate Body pointed out that: 'the dictates of due process could better be served if panels had standard working procedures that provided for appropriate factual discovery at an early stage in panel proceedings.'⁶⁰

This underlying connection between due process, timely information, and the opportunity to present a defence, has been reaffirmed in many instances. Thus in *EC – Computer Equipment*, the Appellate Body stated that: '[a]s the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the panel'.⁶¹ In *Australia – Salmon*, the Appellate Body said that due process 'entails providing the parties adequate opportunity to respond to the evidence submitted'⁶² and made the further point that a 'fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it'.⁶³ In *Mexico – Corn Syrup (21.5.)*, the Appellate Body referred to the concept of due process in describing the obligation of panels 'to address issues that are put before them by the parties to a dispute'.⁶⁴

Based on the foregoing, it appears that the concept of due process requires parties to have an opportunity to be heard and present a defence and requires panels and the Appellate Body to address the issues raised by the parties. It follows that parties to disputes ought to have an adequate opportunity to defend their positions when the Appellate Body has to complete the analysis. At present, this may not necessarily be the case in all instances.

Remand authority would provide address these concerns of due process and fairness. If an issue not addressed at the panel stage had to be resolved to settle the dispute, the Appellate Body could refrain from completing the analysis and instead send the case back to the panel in order to give the parties the right to defend themselves. The Appellate Body would not feel compelled by duty to complete the analysis.⁶⁵ Thus, remand authority would: (a) permit the exercise of judicial economy by panels, where appropriate; and (b) minimise procedural unpredictability for the parties with respect to the issues on appeal. From a procedural standpoint, remand authority would address the current problems of the Appellate Body practice of completing the analysis.

⁶⁰ Ibid, para 95.

⁶¹ Appellate Body Report, *EC – Computer Equipment*, para 70.

⁶² Appellate Body Report, *Australian – Salmon*, para 272.

⁶³ Appellate Body Report, *Australian – Salmon* para 278.

⁶⁴ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para 36.

⁶⁵ See above nn 31 and 34.

B Scope of Appellate Review

As previously indicated, a problem with the Appellate Body completing the panel's analysis is that the decisions made by the Appellate Body on new issues are not subject to review.⁶⁶ If the Appellate Body had remand authority, it would not need to undertake de novo reviews and thus make non-reviewable decisions on new issues. Remand authority would also minimise the Appellate Body's involvement in issues of fact, exceeding its express authority. It could thus reinforce the Appellate Body's function in dealing with issues of law, preserving the panel as the trier of facts, as emphasised by the Appellate Body in *US – Wheat Gluten*.⁶⁷

C Delays in Dispute Settlement

1 Implications for the Parties

Perhaps the most important issue in the discussions for allowing remands in the context of the DSU is the likely delays that remand would impose on all Members.⁶⁸ Palmeter recalls that one of reasons for the absence of an Appellate Body remand authority is 'the perceived need during the Uruguay Round to fit the entire dispute settlement process into the time-frame of Section 301 of the United States Trade Act of 1974'.⁶⁹

For complaining Members, and particularly for their constituents affected by the measures at issue, delays caused by remands could increase the injury caused by the challenged measure. Consequences of delays may be aggravated by the lack of any interim relief in the WTO dispute settlement system, the impossibility of taking retaliatory actions until authorisation from the Dispute Settlement Body (DSB) is obtained (after adoption of the panel report and expiry of the relevant period for implementation), and the fact that the system does not provide retrospective compensation for damage already caused.⁷⁰

For defendant countries, remands could be used as a litigation technique to enable WTO-inconsistent measures to be maintained for longer. The possibility of remand could even induce defendants to prompt procedural failures in order to force remand. If remands were used as litigation techniques rather than to achieve the prompt settlement of disputes, they could be contrary to the object and purpose of the DSU: '[t]he procedural

⁶⁶ Palmeter, above n 52, 43.

⁶⁷ See above n 59.

⁶⁸ Michael Hathaway, 'Commentary on "The Appellate Body"' (2000) 31 *Law and Policy in International Business* 697, 699.

⁶⁹ Palmeter, above n 52, 43.

⁷⁰ Article 3.7 of the DSU; Petersmann, above n 3, 42.

rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes'.⁷¹

At first glance, remand authority would undermine the objective of prompt settlement of disputes. However, this argument is not totally persuasive, as remand would avoid the reinitiation of dispute settlement procedures and, therefore, could abbreviate the total length of a dispute. In other words, at present, if the Appellate Body cannot address some of the claims validly raised by the parties before the panel, it ought to leave the issue undecided, obliging the complainant, if it still interested in asserting its rights, to restart the whole dispute settlement proceedings. For a complainant, the delay in this case could well be greater than if remands were possible.⁷² As a result, although remand authority may represent delays from a short-term perspective, it may also be seen as a useful tool for saving time from a longer-term view-point.

2 Attenuation of Delays with other DSU Reforms

Delays in proceedings that remands could cause may be minimised by other kinds of DSU reforms. We refer to the implementation of provisional measures and the modification of the effect of the dispute settlement decisions from an *ex nunc* (prospective) to an *ex tunc* (retrospective) perspective.

The possibility of remands, if implemented together with the possibility of provisional measures, would minimise the nullification or impairment of benefits that might be brought about any procedural delays. The relevant issue would be to determine the stage at which such measures should be implemented. They could be implemented after the circulation of the Panel Report to Members, or when the panel is convinced that there is sufficient evidence to presume nullification or impairment. However, this last proposal would impose a duty on panels or the Appellate Body to clearly define uniform rules for making this assessment.

As recalled by Petersmann: '[i]n GATT dispute settlement proceedings under Article XXIII, the claimant states have regularly requested only withdrawal of the illegal act in an *ex nunc* manner, without demanding

⁷¹ Appellate Body Report, *US – FSC*, para 166. It is likely that the possibility of remands will encourage WTO Members to rely on more private lawyers. In fact, this could lead to greater clarification and evolution of WTO law

⁷² Of course, were the Appellate Body to leave an issue undecided, some of the proceedings would not last as long as they did the first time. For instance, consultations or the establishment of the panel and the term of reference could be abbreviated. The closer the error is located to the beginning of the WTO dispute settlement procedure, the longer the remanded case would last: Palmeter and Mavroidis, above n 3, 31.

reestablishment of the *status quo ante* or of the situation that would have existed in the absence of the illegal act.⁷³ According to this author, the only exception to this rule was five antidumping and countervailing duties cases where the panels recommended not only the removal of the five GATT inconsistent measures but also the reimbursement of the duties to importers. This author concludes that 'GATT law seems to recognise only a limited legal basis for an international right to reimbursement of certain illegal duties.'⁷⁴

This practice appears to prevail in the WTO context, on the basis of Article 19.1 of the DSU, under which panels and the Appellate Body typically recommend that Members 'bring into conformity' with the relevant WTO agreement any measure found to be inconsistent. Under the SCM Agreement, however, the practice appears to provide an exception to this general rule. According to Article 4.7 of the SCM Agreement, prohibited subsidies must be withdrawn without delay. In *Australia – Automotive Leather II (21.5.)* a subsidy was granted by the Australian Government to domestic producers and exporters of automotive leather. The subsidy was granted only once, prior to the initiation of dispute settlement proceedings. Applying the general rule in Article 19.1 of the DSU and the *ex-nunc* effect from the GATT and WTO practices would have provided no significance or *effect utile* to Article 4.7 of the SCM Agreement. Accordingly, the panel found that the obligation to withdraw a subsidy under Article 4.7 is not limited to prospective action;⁷⁵ rather, Article 4.7 of the SCM Agreement, in this case, required repayment of the prohibited subsidy.⁷⁶ This Panel report was not appealed. Given the absence of subsequent jurisprudence on prohibited subsidies that no longer exist at the time of the final rulings and recommendations in a WTO dispute, the question of *ex tunc* effects in relation to such subsidies remains uncertain.

In *Guatemala – Cement II*, the panel denied Mexico's request concerning the reimbursement of antidumping duties because it considered that the issue had not been fully explored in the dispute. Unlike the previous case, the request of Mexico was based on Article 19.1 of the DSU, which is recognised as establishing the *ex nunc* effect:

[W]e note that Guatemala has now maintained a WTO-inconsistent anti-dumping measure in place for a period of three and a half years ... Mexico's request raises

⁷³ Ernst-Ulrich Petersmann, 'International Trade Law and the GATT/WTO Dispute Settlement System 1948-1966: An Introduction' in Ernst-Ulrich Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 5, 42.

⁷⁴ *Ibid* 43.

⁷⁵ Panel Report, *Australia – Automotive Leather II*, para 6.39.

⁷⁶ *Ibid* para 6.45.

important systemic issues regarding the nature of the actions necessary to implement a recommendation under Article 19.1 of the DSU, issues which have not been fully explored in this dispute. Thus, we decline Mexico's request to suggest that Guatemala refund the anti-dumping duties collected.⁷⁷

DSU reform to enable decisions of WTO panels and the Appellate Body to have *ex tunc* effect would oblige Members to withdraw WTO-inconsistent measures or to offer compensation for the time they have been in place. Losing parties would therefore have to restore the situation to that existing before the nullification or impairment. This kind of reform would create incentives for overcoming the fears of delays in dispute settlement proceedings, which would be more acute if remand were introduced.

D Resource Implications for the WTO Adjudicating Bodies

For panels and the Appellate Body, remands could require major additional resources in terms of time and personnel. However, an overall assessment would also indicate significant benefits. For the Appellate Body, with remands the workload could decrease. The Appellate Body could avoid completing the analysis if it could refer the issue back to the panel. In addition, the Appellate Body would not need to delve into factual issues in order to advance a prompt settlement of a dispute. Remands could thus promote expeditious appellate review.

For panels, the introduction of remands could raise important challenges. The DSB would probably receive the remanded case from the Appellate Body and then reconvene the original panel to the extent possible. The first issue this raises is whether the original panelists would be willing to re-examine the remanded file, taking account of the fact that the current panel system is ad hoc. Panelists are appointed on a case-by-case basis and are not remunerated as permanent WTO staff members. Under this system, one might expect that it would be difficult to find specialists who would agree to serve as panelists without a clear limit on the time required.

Article 21.5 of the DSU provides some guidance as to the difficulties that may arise with recalling original panelists. This provision may be regarded as an exception to the current ad hoc character of the panel system. It provides:

Where there is disagreement as to the existence or consistency with a covered agreement of measures

⁷⁷ Panel Report, *Guatemala – Cement II*, para 9.7.

taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, *including wherever possible resort to the original panel*.⁷⁸

Although the words ‘wherever possible’ indicate that the original panelists are not necessarily bound to serve in a Article 21.5 panel, of the more than twenty Article 21.5 panels established to date, in only four have any of the original panelists had to be replaced.⁷⁹ Moreover, in two other cases, the same panelists have served on two successive Article 21.5 panels in relation to the same dispute.⁸⁰

This evidence suggests that panelists under the current ad hoc system would often be willing to get involved again if the Appellate Body remanded their original case. Accordingly, it would seem unnecessary to change the current ad hoc panel system to a system of permanent panelists purely to accommodate a new remand procedure.

Although remand authority is sometimes conceived as a procedural tool to permit panels to exercise judicial economy,⁸¹ it may contrarily create incentives for panelists to address all claims raised by the parties in order to avoid the possibility of remands. This could be seen as a negative, over-cautious and time-consuming approach. In fact, seen in a more positive light, remand authority could induce ad hoc panelists to be more careful with their findings and the use of judicial economy in order to avoid remands. They could refrain from the use of judicial economy in instances when it might be risky, in order to provide the Appellate Body with all the necessary elements to resolve the dispute.

E Possible Alternatives to Remand Authority

There are good arguments for considering remand authority as an alternative to deal with the problems arising from modifications and reversals of panel’s findings and conclusions. Other alternatives for reform could include enlarging the task of panels and reducing their use of judicial economy. However, this would increase the burden of panel work. Another alternative would be to expand the Appellate Body’s powers of review so as to allow it to delve into the facts of a case and make factual findings on its own. However, this would obviously increase the workload of the Appellate Body.

⁷⁸ Emphasis added.

⁷⁹ These cases were: *Mexico – Corn Syrup (Article 21.5 – US)*; *Canada – Dairy (Article 21.5 – New Zealand and US)*; *EC – Bed Linen (Article 21.5)*; *Canada – Aircraft (Article 21.5)*.

⁸⁰ *Brazil – Aircraft* and *EC – Bananas*.

⁸¹ Palmeter and Mavroidis, above n 3, 149–150.

In the negotiations regarding reform of the DSU, it may be considered that the Appellate Body should advise the parties at the outset of its intentions in relation to matters on which it may be required to complete the analysis. Thus, one way for the Appellate Body to ensure that parties have an opportunity to present their views on new issues it intends to address would be to notify its intention to analyse legal issues not developed by the panel. This would provide the parties with an opportunity to submit their positions and would improve predictability in appellate review. However, the Appellate Body might be reluctant to disclose in advance its intention concerning the legal issues raised on appeal. In addition, this could be burdensome for the parties and increase the workload of the Appellate Body.

IV CONCLUSION

Two Members have proposed remand authority in the current DSU reform process:⁸² the European Communities and Jordan suggest amending the powers of the Appellate Body under Article 17.12 of the DSU so as to allow remands. Both proposals highlight the need for remand when the factual basis at the panel stage prevents the Appellate Body from performing its task and emphasise the guidance that the Appellate Body could provide to the panel for the remand. However, Jordan's proposal contemplates automatic remands by the Appellate Body to the DSB, whereas the European Communities' proposal contemplates remands only upon request by a party when the relevant Appellate Body Report is before the DSB for adoption.

Apart from the constraints imposed by the current DSU rules on the powers of the Appellate Body, remand authority appears to be a feasible alternative to preserve the distribution of competence between panels and the Appellate Body, to preserve the practice of judicial economy, and to provide higher due process guarantees to the parties to WTO disputes. The experience with Article 21.5 procedures suggests that the current ad hoc panel system does not impose an insurmountable obstacle to the introduction of remand proceedings.

⁸² Communication from Jordan, *Jordan's Further Contribution Towards the Improvement and Clarification of the Dispute Settlement Understanding*, TN/DS/W/56 (19 May 2003); Communication from the European Communities, *Contribution of the European Communities and Its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding*, TN/DS/W/38 (23 January 2003).